

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Boating and Ocean Recreation  
Honolulu, Hawaii 96813

December 11, 2009

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

DENIAL OF REQUEST FOR CONTESTED CASE  
HEARING BY BRIAN BARBATA

The petitioner requested a contested case hearing concerning the selection of Honey Bee USA, Inc. as the developer for the haul-out and fuel dock sites located at the Ala Wai small boat harbor as well as the department entering into exclusive negotiations regarding a development agreement. We recommend that the Board deny the petition for a contested case hearing filed by Brian Barbata that was received by the Chairperson and the Division of Boating and Ocean Recreation (DOBOR) on September 8, 2009. See Exhibit A.

BACKGROUND:

On August 28, 2009, DOBOR brought a request to the Board requesting to amend the Board action of July 11, 2008, Agenda Item J-1, authorizing issuance of a request for qualifications (RFQ)/request for proposals (RFP) for public lands at the Ala Wai small boat harbor (AWSBH); approve selection of developer for exclusive negotiations of a development agreement and lease for the fuel dock and haul-out/repair sites at AWSBH, Kalia, Honolulu, Hawaii; authorize the DLNR Chairperson to negotiate and enter the development agreement and lease.

On September 8, 2009, the Chairperson's office received a Petition for a Contested Case Hearing from Magic Island Petroleum, Inc. (MIPI), for agenda item J-1 of the August 28, 2009 Land Board meeting. The sole legal interest of MIPI in item J-1, according to the Petition, is that MIPI currently operates a fuel facility and convenience store under a revocable permit at one of the sites that is the subject of the development.

The Petition takes issue with the Board's decision, stating that the Board failed to take into consideration historical, legal, and existing uses of the parcels that are the subject of item J-1, the adverse impacts on current boat owners and other harbor users who use the existing facilities, the massive impact on the harbor if the development proceeds, historic attempts to improve the subject parcels, the lack of qualifications of Honey Bee, and prior rejection of the same kind of development proposal for the subject parcels.

A contested case hearing is one where the "legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." HRS §91-1(5). A contested case is "required by law" if the statute or rule governing the activity in question mandates a hearing prior to the agency's decision-making or if mandated by due process. See Bush v. Hawaiian Homes Comm'n, 76 Hawai'i 128, 134-35, 870 P.2d 1272, 1278-79 (1994).

MIPI does not identify a particular statute or rule mandating a hearing in this instance. The only statute that may be applicable is HRS Section 171-59 (a), which governs the disposition of public property through direct negotiation. Under subsection (a), had MIPI timely submitted an application for the lease of the Ala Wai property and not been selected, then it may have been entitled to challenge the Board's decision. Because MIPI did not apply, the statute does not give MIPI a basis for a hearing. We conclude that no statute or rule requires a contested case hearing be afforded to MIPI prior to approval of exclusive negotiations with Honey Bee USA, Inc. as part of the RFQ/RFP process.

MIPI's disagreements with the Board's decision to approve of the selection of Honey Bee USA, Inc. as the developer to enter into exclusive negotiations of a development agreement and to enter into a development agreement and lease on the terms and conditions required by the Board are not legal rights, duties, or privileges of MIPI required by law to be determined after an opportunity for agency hearing. We recommend that MIPI's Petition for a Contested Case Hearing dated September 8, 2009 be denied by the Board.

RECOMMENDATION:


That the Board deny the petition for a contested case hearing filed by Brian Barbata based on lack of standing.

Respectfully submitted,



Edward R. Underwood  
Administrator

APPROVED FOR SUBMITTAL:



Daura H. Thielen  
Chairperson and Member

45487

Magic Island Petroleum, Inc.  
1661 Ala Moana Boulevard  
Honolulu, HI 96815  
Telephone No.: (808) 955-8160

RECEIVED

09 SEP -8 11:46

September 8, 2009

**HAND DELIVERED**

DEPT. OF LAND  
& NATURAL RESOURCES  
STATE OF HAWAII

Department of Land and Natural Resources  
1151 Punchbowl Street  
Kalanimoku Building  
Honolulu, Hawaii 96813

Attention: Ms. Laura H. Thielen, Chairperson

RE: Petition for Contested Case Hearing  
Agenda Item J.1  
Meeting: August 28, 2009

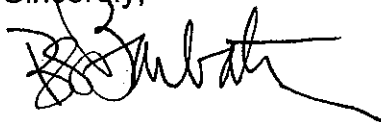
Dear Ms. Thielen:

Attached is Magic Island Petroleum, Inc.'s petition for a contested case hearing regarding DOBOR's proposed exclusive negotiation with Honey Bee USA, Inc. to develop the boatyard and fuel dock properties at the Ala Wai Small Boat Harbor.

Unfortunately, I had to leave the hearing on August 28th before I could personally read my testimony to the Board. I believe, however, that my testimony was read in my absence. A written request for a contested case hearing was also submitted to the Board after the close of the hearing.

We believe it will be in the public's best interest to address the various issues set forth in the Petition regarding DOBOR's proposed development of the Ala Wai Small Boat Harbor. We look forward to presenting all of these relevant issues before the hearing officer.

Sincerely,



Brian Barbata  
President

cc: Division of Boating and Ocean Recreation (w/enclosure)  
333 Queen Street, Suite 300  
Honolulu, Hawaii 96813

Exhibit A

BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

1. Name Magic Island Petroleum, Inc. Brian Barbata, President  
Phone (808) 955-8160 Fax \_\_\_\_\_
2. Address 1661 Ala Moana Blvd., Honolulu, HI 96815  
Email Address bjb@hawaii.rr.com
3. Attorney (if any) N/A Phone \_\_\_\_\_
4. Address \_\_\_\_\_  
Email Address \_\_\_\_\_
5. Subject Matter: Agenda Item J.1: The BLNR recently approved the selection of Honey Bee USA, Inc. as the exclusive developer of two non-contiguous parcels of state-owned land within the Ala Wai Small Boat Harbor. The proposed development of the parcels include non-marine related activities, such as conducting wedding, and non-marine related facilities such as two wedding chapels, a banquet hall, and restaurant and nightclub/bar.
6. Date of Public Hearing/Board Meeting: August 28, 2009
7. Legal Authority under which hearing, proceeding or action is being made: Haw. Rev. Stat. § 91-9.
8. Nature of your specific legal interest in the above matter, including tax map key of property affected: Magic Island Petroleum, Inc. ("MIP") currently operates a fuel facility and convenience store under Revocable Permit No. B-03-06 on one of the subject development sites, TMK Parcel No. 2-3-037:020, consisting of approximately 15,199 square feet.
9. The specific disagreement, denial or grievance with the above matter: The BLNR's decision failed to take into consideration historical, legal and existing uses of the subject parcels, real adverse impact on current boat owners and other Harbor users who use the existing facilities, the massive impact on the Harbor if the development proceeds, historic attempts to improve the subject parcels, the lack of qualifications of Honey Bee, and prior rejection of the same kind of development proposal for the parcels.
10. Outline of specific issues to be raised: The issues involved in the requested contested case hearing include, but are not limited to, examination of the development proposal and the various non-conforming uses, current users' objections over the proposed development, the historical rejection of the same kind of development that was recently approved by the Board, the propriety of combining the two parcels for the single development, and the virtual impossibility of constructing a three-story structure and fuel system on the "fuel dock" parcel.

11. Outline of basic facts: See Response to Questions 5, 8, 9, and 10.

12. The relief or remedy to which you seek or deem yourself entitled: The relief/remedy that MIP seeks includes, but is not limited to, rejection of Honey Bee USA, Inc.'s proposal for the development of the subject parcels; cessation of all negotiations with Honey Bee USA, Inc.; a review of appropriate uses and long term lease terms for both parcels; a requirement that prospective lessees of the fuel dock and boatyard have the requisite experience, including a history of other such operations; rejection of the proposed development agreement pursuant to the RFQ/RFP; and a lease agreement with Honey Bee USA, Inc. for the subject parcels.

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(If there is not sufficient space to fully answer any of the items above, use additional sheets of paper.)

**The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above. Dated: September 8, 2009**